FILE COPY

JUL 6 196
JAMES R. BROWNING

No. 171

In the

Supreme Court of the United States

EVANS PRODUCTION CORPORATION,
Petitioner,

v.

DON J. SHAW,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

GEORGE S. TERRY,
FRANK J. SCURLOCK,
2400 Republic National Bank Building,
Dallas 1, Texas,
Attorneys for Respondent.

WARLICK LAW INC — 3203 VALDINA STREET — DALLAS — RI 1-6711

GENERAL INDEX

	Page
Opinion	1
Comments on Questions Presented by Petitioner	2
Statement of the Case	2
Argument	4
Of No General Importance	4
Local Law	5
Weighing Evidence	6
Rule 51 and Requested Instructions	6
Conclusion	8

	Page
Appalachian Power Co. v. American Institute of C. P. A., 80 S. Ct. 16, 18	6, 7
Ellisor v. Kennedy, Tex. Civ. App., 128 S. W. 2d 842, 844 (ref. 1939)	5
Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817	5
Federal Trade Commission v. Standard Oil Co., 355 U. S. 396, 400, 78 S. Ct. 369, 371	6
Gibson v. Lockheed Aircraft Service, 350 U. S. 356, 76 S. Ct. 366	7
Hillsborough TP. v. Cromwell, 326 U. S. 620, 629, 66 S. Ct. 445, 451	6
Layne & Bowler Corp. v. Western Well Works, 261 U. S. 387, 393, 43 S. Ct. 422, 423	5
MacGregor v. State Mut. Life Assur. Co., 315 U. S. 280, 62 S. Ct. 607	6
McBride v. Toledo Terminal Railroad Co., 354 U. S. 517, 77 S. Ct. 1398	6
McDonald v. Jarka, 2 Cir., 144 F. 2d 53	7
National Labor Relations Board v. Pittsburg S.S. Co., 340 U. S. 498, 502, 71 S. Ct. 453, 456	5
Neece v. A.A.A. Realty Co., 322 S. W. 2d 597 (1959 Sup. Ct.)	5
Pace Corporation v. Jackson, 155 Tex. 179, 284 S. W. 2d 340, 344 (1955)	5
Rosenfield v. Curtis Pub. Co., 2 Cir., 163 F. 2d 660	7
Steele v. General Mills, 329 U. S. 433, 439, 67 S. Ct. 439, 442	6
Tom v. Roberson, Tex. Civ. App., 182 S. W. 698, 700 (ref. 1916)	5

No.

In the

Supreme Court of the United States

EVANS PRODUCTION CORPORATION,
Petitioner,

v.

DON J. SHAW,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

This brief in opposition is filed on behalf of the Respondent, Don J. Shaw.

OPINION

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported in *276 F. 2d 313*, and is copied at pp. 21 to 33 of the Petition.

COMMENTS ON QUESTIONS PRESENTED BY PETITIONER

With respect to question 1, Petitioner states, "the record shows that such requested additional instructions were discussed by the Court with counsel for both parties."

Respondent contradicts this statement. The record positively does not show that the requested instructions were discussed. (R. 280.)

By questions 2 and 3, Petitioner complains that the district court submitted to the jury "over objection, a special interrogatory."

That statement can only be true in the event Petitioner's two motions for judgment can be construed or regarded as an "objection." The Petitioner never at any time specifically objected to either of the two special interrogatories which were submitted to the jury.

Under "specifications of error to be urged," Petitioner states that with respect to one of the interrogatories submitted to the jury there was "no evidence," and with respect to the other interrogatory that "the evidence was uncontroverted."

STATEMENT OF THE CASE

Respondent agrees that the issue in the case is the interpretation of the stock purchase letter agreement of May 28, 1953, which is set out in full in both the opinion and the Petition.

The letter agreement provides in paragraph (1) that after the expiration of a certain period of time, the Petitioner would repurchase from the Respondent the stock at its book value, "plus a value of $.50 a barrel for proven oil reserves of the Company." It is this clause which created the problem for the parties and the courts. The Petitioner has always contended that the 50¢ per barrel was to be prorated on the basis of stock ownership, whereas, Respondent has always contended that he was to receive 50¢ per barrel on all of the oil reserves.

At the pretrial conference, the district court concluded that the letter agreement was ambiguous, and this conclusion is evidenced by the fact that the two special issues, which were ultimately submitted to the jury, are embodied in the very complete and comprehensive pretrial order. (R. 42-59.) At the trial, both parties introduced extrinsic evidence. The court overruled both of Petitioner's motions for judgment (R. 222, 280), thus indicating that it was still of the opinion that the agreement was ambiguous and, further, that the evidence was in conflict. Petitioner filed a motion in accordance with Rule 50(b); and finally, a motion for a new trial, both of which were overruled. Before the motion for new trial was considered by the trial judge, the evidence had been transcribed and the trial judge stated that he had read it. (R. 385.) This explanation is made in order to emphasize the very careful attention given the case in the district court.

The court's charge to the jury was 100% in writing. (R. 295.) Petitioner did not specifically object to any part

of the charge, however, it did request the court to submit five special instructions. (See p. 17 of Petition.) Actually, there is very little difference between the court's charge and the requested instructions. Therefore, the court made the following notation on each request.

> "The defendant's foregoing request for instruction was this the 10th day of February, 1959, refused, except insofar as covered in the Court's Charge." (R. 366-370.)

The Petitioner did not, in keeping with Rule 51, make any objection to the action of the court.

The Court of Appeals held that the trial court did not err in submitting the case to the jury, and it is most significant that the Court of Appeals held that independent of the jury verdict, the letter agreement is subject to the interpretation contended for by the Respondent. (Petition, p. 26.)

It is also significant to note that the Court of Appeals holds that the trial court's charge to the jury is adequate. (Petition, p. 31.)

ARGUMENT

A casual examination of the Petition discloses that this case does not meet the requirements of Rule 19 of this Court. Only elementary local law and procedural points are involved.

OF NO GENERAL IMPORTANCE

There are reported cases involving stock purchase agreements, but this case is unique in that the letter agreement of May 28, 1953, has tacked onto it the clause, "plus a value of $.50 a barrel for proven oil reserves of the Company."

During the course of this litigation, neither side cited a case which in any way resembles this case. Therefore, this is not a case "involving principles, the settlement of which is of importance to the public, as distinguished from that of the parties." *Layne & Bowler Corp. v. Western Well Works, 261 U. S. 387, 393, 43 S. Ct. 422, 423; National Labor Relations Board v. Pittsburg S.S. Co., 340 U. S. 498, 502, 71 S. Ct. 453, 456.*

LOCAL LAW

This is a diversity case and, therefore, the court is required to follow the law as announced by the appellate courts of Texas. *Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817.* In Texas it is the responsibility of the court to determine if an agreement is ambiguous, and having made such determination, it is proper to permit the introduction of extrinsic evidence. If the evidence is in conflict, then disputed fact issues are submitted to the jury. Based on the jury verdict, the court construes the agreement. The district court followed this procedure and its action was affirmed by the Court of ~~Civil~~ Appeals. *Ellisor v. Kennedy, Tex. Civ. App., 128 S. W. 2d 842, 844 (ref. 1939); Neece v. A.A.A. Realty Co., 322 S. W. 2d 597 (1959 Sup. Ct.); Pace Corporation v. Jackson, 155 Tex. 179, 284 S. W 2d 340, 344 (1955); Tom v. Roberson, Tex. Civ. App., 182 S. W. 698, 700 (ref. 1916).*

The three Texas cases cited by Petitioner at p. 12 of its Petition are in accord with the cases cited above.

Steele v. General Mills, 329 U. S. 433, 439, 67 S. Ct. 439, 442:

> "The Circuit Court of Appeals has not disagreed with this holding of the District Court sitting in Texas. Under these circumstances we shall leave undisturbed the interpretation placed upon purely local law by a Texas federal judge."

See also *MacGregor v. State Mut. Life Assur. Co., 315 U. S. 280, 62 S. Ct. 607; Hillsborough TP. v. Cromwell, 326 U. S. 620, 629, 66 S. Ct. 445, 451; Appalachian Power Co. v. American Institute of C. P. A., 80 S. Ct. 16, 18.*

WEIGHING EVIDENCE

With respect to Special Issue 1, the Petitioner says the evidence was not in conflict; and with respect to Special Issue 2, the Petitioner says there was no evidence to support the verdict of the jury.

In order for this Court to pass on these two points it would require a very detailed study and analysis of the evidence contained in the record. This Court is not expected to weigh the evidence in a case of this character. *McBride v. Toledo Terminal Railroad Co., 354 U. S. 517, 77 S. Ct. 1398; Federal Trade Commission v. Standard Oil Co., 355 U. S. 396, 400, 78 S. Ct. 369, 371.*

RULE 51 AND REQUESTED INSTRUCTIONS

In connection with Petitioner's requested instructions to the jury, it is very obvious that it did not follow that part of Rule 51 reading:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto

> before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

The Court of Appeals held that Petitioner did not comply with Rule 51. Petitioner further states that the holding is in conflict with *Swinney v. United Feature Syndicate, Inc., 2 Cir., 129 F. 2d 904*, and *Williams v. Powers, 2 Cir., 135 F. 2d 153*. It is respectfully submitted that an analysis of those two opinions will not disclose a conflict. Respondent's contention is supported by subsequent decisions of the Second Circuit, as follows: *McDonald v. Jarka, 2 Cir., 144 F. 2d 53; Rosenfield v. Curtis Pub. Co., 2 Cir., 163 F. 2d 660.*

Subsequent to the date of the two decisions of the Second Circuit cited by Petitioner, Justice Frankfurther of this Court made an examination of 118 decisions involving Rule 51, and concluded there was no "conflict and confusion." *Gibson v. Lockheed Aircraft Service, 350 U. S. 356, 76 S. Ct. 366.*

Appalachian Power Co. v. American Institute of C. P. A., 80 S. Ct. 16, 18:

> "But ordinarily an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Judge in relation to a particular set of facts."

It is respectfully submitted that the Petition for writ of certiorari is frivolous, does not purport to meet the requirements of Rule 19, and does not have the semblance of merit. The filing of the Petition has, and will, delay by several

months Respondent's collection of the judgment. Rule 56 was designed for cases of this character and Respondent respectfully submits that in addition to interest, he should be awarded damages by this Court.

WHEREFORE, Respondent prays that the Petition for writ of certiorari be denied and that he may be awarded damages for delay as contemplated by Rule 56.

Respectfully submitted,

GEORGE S. TERRY,
FRANK J. SCURLOCK,
2400 Republic National Bank Building,
Dallas 1, Texas,
Attorneys for Respondent.

A copy of the foregoing brief in opposition was on this the day of , 1960, mailed to Carrington, Johnson & Stephens and Hubert D. Johnson, Mercantile Bank Building, Dallas, Texas; R. G. Storey, Robert M. Martin, and Storey, Armstrong & Steger, Republic National Bank Building, Dallas, Texas.